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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RALPH CASSADY, as Trustee, etc., Plaintiff and Appellant, v. CONSTANCE L. CASSADY, as Trustee, etc., et al., Defendants and Respondents.	B237815 (Los Angeles County Super. Ct. No. BP084663)

APPEAL from an order of the Superior Court of Los Angeles County, Michael I. Levanas, Judge. Affirmed.

Law Offices of Julian Pollok and Julian A. Pollok; Greines, Martin, Stein & Richland and Marc J. Poster for Plaintiff and Appellant.

Poindexter & Doutré, James P. Drummy, Jeffrey A. Kent and Robert D. Schwartz for Defendants and Respondents.

The Cassady family has been mired in strife over the distribution of Dorothea Cassady's estate for 24 years.[1] Complicating matters, Dorothea's oldest son, Ralph, the trustee of the Dorothea J. Cassady Trust, lent money to his two brothers Michael and Peter. Those loans had not been repaid when Michael died in 2001, leaving his wife Constance as successor to his interest in the trust, or before Peter declared bankruptcy in 2009. The probate court denied Ralph's petition for repayment of these loans from sums that were part of the final distribution of Dorothea's estate to Constance and the bankruptcy trustee for Peter's estate on grounds including the trust contained a spendthrift provision. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Discussions About Assigning Peter's Expectancy Interest in Dorothea's Estate to Ralph and Ralph's Subsequent Loan to Peter*

In 1988 Peter and his wife Beverly owed Ralph money and were concerned they would have to disclose the debt in their application for a loan to purchase a new house. According to Ralph, to avoid the problem Peter suggested he transfer his expectancy in Dorothea's estate to Ralph to satisfy the obligation. Ralph agreed subject to Dorothea's approval. During a discussion with Dorothea, however, Peter said he wanted to exclude his interest in Dorothea's personal effects from the assignment. Although Dorothea approved the arrangement, as well as the general concept of family members assigning their interests among themselves, Ralph rejected the modified terms.

Notwithstanding their failure to reach agreement on resolving the existing debt, Ralph agreed to loan Peter and Beverly an additional $150,000. Because Ralph did not have sufficient cash available, he arranged for his retirement plan to loan the money. Ralph testified the loan had to have a reasonable rate of interest and a due date and be memorialized with a promissory note and secured by a deed of trust in order for the

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[1] Because most of the Cassadys share a surname, we refer to them individually by their first names for convenience and clarity. (See *Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1191, fn. 1.)

retirement plan to make the loan. Ralph, an attorney, drafted a promissory note and security agreement, but Peter and Beverly never signed the documents or made payments.

2. *Creation of the Dorothea J. Cassady Trust, the Battle over Distribution of Tangible Property and the Additional $27,500 Loan to Peter*

After Dorothea had a stroke in April 1989, she asked Ralph to prepare a testamentary trust providing the family home on Midvale Avenue would be divided equally among her four children—Ralph, Michael, Peter and Patricia; Dorothea's personal things (for example, clothing, jewelry and china) would be given to Patricia to distribute in accordance with Dorothea's wishes; and other furniture, furnishings and personal effects located in the Midvale home would be divided according to a 38-page, handwritten list stored in a safe deposit box, which the family refers to as the 1980 list.[2] A notation at the end of the list states, "If you want to exchange with each other okay. If you don't want, then inform others first."

The trust included a spendthrift provision, stating, "No interest in the principal or income of any trust created under the Declaration of Trust shall be anticipated, assigned, or encumbered, or be subject to any creditor's claim or to legal process, prior to its actual receipt by the beneficiary." Ralph testified he explained to Dorothea that the clause was intended to prevent creditors of trust beneficiaries from accessing trust assets without the approval of the trustee. He further explained the clause should not have any effect on Dorothea's prior approval of Peter's assignment of his share of the estate to Ralph, even though it was never formally documented, because she had already consented to it. He also told Dorothea her approval of future transfers would be permissible as amendments to the trust. According to Ralph, Dorothea said, "I want you to also be able to approve it. And I want it so that within the family, people can do assignments."

Dorothea died in May 1989 shortly after executing the declaration of trust, and the battle began. Peter disputed Dorothea's personal property should be distributed in accordance with the 1980 list, contending it was "overwhelmingly unfair."

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2 Patricia is not a party to the litigation.

Demonstrative of the deep current of discontent, Peter made a multimedia presentation to the family in February 1990 complete with a 15 page, single-spaced letter and approximately 30 pages of attachments comparing Dorothea's wishes regarding distribution of her personal property as reflected in her will executed in 1964, a note written in 1975, the 1980 list, a codicil executed in 1983, a codicil executed in 1988 and the trust executed in 1989 and providing summaries by room of the value of the property given to each sibling. While the dispute over the distribution of the personal property continued for years with numerous letters exchanged between Peter and Ralph in which Peter disputed virtually everything, Peter refused to cooperate in any efforts to sell, rent or renovate the Midvale residence, which was in need of substantial repair. Ralph, however, did not press the matter because the real estate market was depressed.

Notwithstanding the disharmony among the siblings, Ralph loaned Peter an additional $27,500 in 1992. In sworn statements Peter has acknowledged, "To the extent these loans were not preliminary distributions but advances against my interest in the trust, I do not [dispute] that $27,500 (without any interest or other charges) should be paid [from] my interest in the trust estate to Ralph." In various letters to Ralph from 1991 through 2003, Peter also insisted he had already sold his interest in the Midvale residence to Ralph to satisfy the $150,000 loan while Ralph insisted through 1998 that the loan was evidenced by a promissory note to be secured by a deed of trust.

3. *Ralph's Loans to Michael; the Dismissal of Ralph's Civil Action To Recover the Debt Against Michael's Estate After His Death*

In addition to loaning money to Peter, Ralph loaned approximately $90,000 to Michael between 1997 to 2001. Ralph testified he and Michael agreed the loans would be repaid from the first distributions of Dorothea's estate; this testimony is consistent with correspondence between Ralph and Michael. However, as reflected in a December 2000 letter from Michael to Ralph, Michael believed Ralph had purposely delayed distributing the estate and thus owed him at least $300,000 as income Michael could have earned on the proceeds from his interest in the Midvale home had it been timely sold.

Michael unexpectedly died in July 2001. In May 2003 Constance was appointed executor of his estate. In March 2004, after Constance had rejected Ralph's creditor claim for the $90,000 debt, Ralph filed a complaint in Los Angeles Superior Court against Constance as executor. In response to Constance's demurrer contending the complaint was barred by the one-year statute of limitations applicable to claims against decedents (Code Civ. Proc., § 366.2), Ralph amended the complaint to allege a cause of action for equitable lien. Ralph contended Constance, by thanking Ralph for having financially aided Michael during his lifetime and concealing she intended to renege on his promise to repay the debt, lulled Ralph into a false sense of security that caused him to refrain from initiating legal action until more than one year after Michael's death.

In December 2004 the court sustained Constance's demurrer to Ralph's third amended complaint without leave to amend, explaining, "[Ralph] has not alleged facts which would permit this court to grant equitable relief despite the fact that this action is time-barred by code of Civil Procedure section 366.2." In March 2005 the court ordered final distribution of Michael's estate, comprised solely of his 25 percent interest in Dorothea's trust, to Constance as trustee of Michael's family trust.

4. *Trial on Constance and Peter's Petition; the Sale of the Midvale Home*

In December 2004, after Ralph's complaint was dismissed, Constance petitioned to remove Ralph as trustee of the Dorothea J. Cassady Trust, for judicial review of his accountings and to surcharge him in an amount of at least $500,000 for the 15-year delay in distributing trust assets. Peter joined the petitions. In October 2005 the probate court approved the sale of the Midvale home for $1.26 million in its "as is" condition.

In April 2006 the probate court denied Constance and Peter's removal petition, imposed a surcharge against Ralph as trustee for approximately $11,000 in unreasonable expenses to maintain the Midvale home and ordered Ralph to distribute the remaining trust assets, including Dorothea's personal property in accordance with the 1980 list. The court found Peter's "disruptive conduct" was primarily the cause of the failure to rent the Midvale home and the delay in selling it. We upheld the probate court's ruling in an

unpublished decision filed October 15, 2007. (*Cassady v. Cassady* (Oct. 15, 2007, B191947) [nonpub. opn.].)

5. *The Instant Petition for Approval of Accounts and Proposed Distribution; Peter's Bankruptcy*

In August 2008 Ralph filed a first amended petition seeking an award of fees for services as trustee and approval of accounts and distribution of the remaining trust assets. Ralph claimed he was entitled to distribution of Peter's entire share of the estate based on unpaid loans to him of more than $250,000, and to $88,951.83 of Constance's share for the unpaid loans to Michael. Peter and Constance objected, contending in part the claims based on the loans were barred by the statute of limitations.

Peter and Beverly filed for bankruptcy under Chapter 7 of the United States Bankruptcy Code (11 U.S.C. §§ 701-784) in April 2009; David Y. Farmer was appointed trustee of the bankruptcy estate. In October 2009 Peter and Beverly's debts were discharged in bankruptcy. In November 2009 Farmer, as bankruptcy trustee, was substituted for Peter in the probate proceedings.[3]

Trial on the petition occurred over eight days in June, August and December 2010. The probate court provisionally considered extrinsic evidence, including Ralph's testimony Dorothea wanted her children to be able to transfer trust assets among themselves, to determine whether the spendthrift clause was reasonably susceptible to the meaning Ralph's loans to his brothers were exempt from its scope. On March 25, 2011 the court filed its statement of decision denying Ralph's petition to distribute to him any money from Constance or Peter's share of the trust.[4] Among other grounds, the court found the claims were barred by the spendthrift provision. The court explained, "The court finds that the extrinsic evidence provided by Ralph regarding communications with

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3 Although Farmer is the real party in interest, for continuity we will generally refer to Peter.

4 The court awarded Ralph $69,178.20 in fees for ordinary service and $82,910 for extraordinary services as trustee from May 1989 through December 2007. There is no challenge to that portion of the court's order.

his mother about her intent did not demonstrate that the language of the Spendthrift Clause is susceptible to more than one meaning and, therefore, the court rules the extrinsic evidence is inadmissible. The extrinsic evidence offer contradicts the plain language of the Spendthrift Clause." The court ordered Ralph to distribute the trust assets to all four beneficiaries in equal shares after payment of fees and costs.

DISCUSSION

1. *Principles of Trust Interpretation; Standard of Review*

Like the fundamental goal of contract interpretation, in construing a trust instrument "'"the duty of the court is to first ascertain and then, if possible, give effect to the intent of the maker." [Citations.]' [Citation.] '[Probate Code s]ection 21102 provides, "[T]he intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."' [Citations.] '"In construing a trust instrument, the intent of the trustor prevails and it must be ascertained from the whole of the trust instrument, not just separate parts of it."'" (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 944.)

"[P]arol evidence is properly admitted to construe a written instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' [Citation.] [¶] The decision whether to admit parol evidence involves a two-step process. . . . [T]he court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165; see *De Mille v. Ramsey* (1989) 207 Cal.App.3d 116, 125 (*De Mille*).)

The trial court's threshold determination of ambiguity is a question of law subject to independent review. (*Winet v. Price, supra,* 4 Cal.App.4th at p. 1165.) "The second step—the ultimate construction placed upon the ambiguous language—may call for differing standards of review, depending upon the parol evidence used to construe the contract. When the competent parol evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld as long as it is supported by substantial evidence. [Citation.] However, when no parol evidence is introduced (requiring construction of the instrument solely based on its own language) or when the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing." (*Winet*, at pp. 1165-1166.)

2. *The Probate Court Did Not Err in Ruling the Spendthrift Clause Barred Ralph's Recovery of the Outstanding Debt from Trust Distributions*

As a general matter, a spendthrift provision in a trust prohibits the trust beneficiary from assigning or otherwise encumbering his or her interests in trust assets while the property remains in the trust. (See *Chatard v. Oveross* (2009) 179 Cal.App.4th 1098, 1104 ["[a] spendthrift trust is created where the settlor gives property in trust for another, and provides that the beneficiary cannot assign or otherwise alienate his or her interest, and that it shall not be subject to the claims of the beneficiary's creditors"]; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 151, p. 715 [same]; see also Prob. Code, § 15301, subd. (a) ["if the trust instrument provides that a beneficiary's interest in principal is not subject to voluntary or involuntary transfer, the beneficiary's interest in principal may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary"]; *Chatard,* at p. 1106 ["a spendthrift provision protects the income and principal interests of the beneficiaries from third party claims as long as the income or principal is properly held by the Trust"].)

Ralph contends the probate court erred in concluding his claims against Peter and Michael were barred by the spendthrift clause because his conversation with Dorothea and the note at the end of the 1980 list stating the siblings can "exchange with each

other" is proof she intended Ralph and his siblings be able to assign interests in her estate among themselves. To be sure, this evidence is uncontroverted. Nevertheless, extrinsic evidence may not be admitted to "show that what was meant by the words used was something to which, under all of the circumstances, the words are not reasonably susceptible." (*Levy v. Crocker-Citizens Nat. Bank* (1971) 14 Cal.App.3d 102, 104; see *Estate of Lensch* (2009) 177 Cal.App.4th 667, 674-675 [in light of extrinsic evidence, if "provisions of the will are not reasonably susceptible of two or more meanings, there is no uncertainty arising upon the face of the will [citations] and any proffered evidence attempting to show an intention *different* from that expressed by the words therein, giving them only the meaning to which they are reasonably susceptible, is inadmissible"].) The key words in the spendthrift clause—that "*no* interest" shall be anticipated, assigned, encumbered or subject to "*any* creditor's claim" are simply not susceptible to a meaning that would create an exclusion to this all-inclusive restriction for other beneficiaries under the trust. "An ambiguity arises when language may be applied in more than one way. To say that language is ambiguous is to say there is more than one semantically permissible candidate for application, though it cannot be determined from the language which is meant." (See *Estate of Dye* (2001) 92 Cal.App.4th 966, 976.) Coupled with the principle that a decedent is presumed to know the law, there is no basis on which to find the spendthrift clause is ambiguous regardless of what Ralph, the lawyer who drafted the provision, now claims that Dorothea may have intended. (See *id.* at p. 977 ["These tendered facts do not create any ambiguity in the will because they fail to raise a semantically plausible alternative candidate of meaning. If true, they show his father should have consulted a lawyer, because to effectuate his beliefs he needed to have a valid will disinheriting his adopted-out children."].)

Ralph argues the court in *De Mille*, *supra*, 207 Cal.App.3d 116 was willing to examine the circumstances surrounding the inclusion of a spendthrift clause in a testamentary trust and concluded, notwithstanding that provision, it would enforce against trust assets the estate beneficiaries' agreement to share equally in their mother's estate even though her will directed a different, and uneven, distribution. *De Mille* is

quite different from the case at bar. Significantly, *De Mille* itself recognized the general rule was stated in *Kelly v. Kelly* (1938) 11 Cal.2d 356 in which the Supreme Court held the assignment by a trust beneficiary of one-half his interest in property he was to receive from a trust that contained a spendthrift clause did not give the assignee (his former wife) a claim against trust property upon its distribution to him. (*Kelly*, at p. 363; see *De Mille*, at p. 124.)[5] The *De Mille* court distinguished *Kelly* based upon the trial court's finding, supported by substantial evidence that included language in the trust document itself, that the spendthrift provision was created for the sole purpose of protecting the inheritance of one of the testator's daughters (Carla) from the creditors of her estranged husband. The evidence supporting that finding was not only Carla's testimony but also language by the testator in the will and trust explaining, "this trust is created for the protection of my daughter from possible claims of creditors" and giving the trustee discretion to terminate the trust and distribute the entire proceedings to Carla if "there is no longer a need for such protection." Given the limited purpose of the spendthrift provision, the *De Mille* court concluded that enforcing the agreement by Carla and her sister to share equally their mother's entire estate did not frustrate the trust provision and was not inconsistent with the principles expressed in *Kelly*. Unlike in *De Mille*, there is no language in Dorothea's trust instrument that is susceptible of two different meanings, nor is there any expression of intent in the trust document that authorizes exclusions for Michael's or Peter's share to secure loans from Ralph.

Ralph's additional arguments challenging the spendthrift provision are without merit. Citing *Frazier v. Wasserman* (1968) 263 Cal.App.2d 120, Ralph argues the trust

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5 The *Kelly* Court also held, although the prior agreement gave the assignee no right in specific trust property received by the beneficiary, the agreement could be enforced and the assignee's rights upheld by an action for damages for breach of contract. (*Kelly v. Kelly, supra,* 11 Cal.2d at pp. 363-364.) That was Ralph's proper remedy, as well. (See *De Mille, supra,* 207 Cal.App.3d at p. 124 ["In other words, Mrs. Kelly was entitled to the value of the property she would have received had her husband performed his promise. Having obtained a judgment for damages, she could then levy upon property not exempt from execution, including property received by Mr. Kelly from the trust."].)

terminated by its own terms no later than May 20, 2010, thus the spendthrift clause was no longer in effect when the court entered its final order in October 2011.[6] In *Frazier* the court stated, "[T]he donor of a spendthrift trust can only protect his gift from the claims of the beneficiary's creditors during the life of the trust. Therefore, once the corpus of a spendthrift trust vests in the beneficiary and is placed in his hands, or under his direct control, it may not only be dissipated by the beneficiary contrary to what the donor may have wanted, but it may also be reached by the beneficiary's creditors through attachment or execution to satisfy his debts (antecedent or otherwise)." (*Id.* at p. 127.) We, of course, agree with the general principle stated in *Frazier*, but it is specious for Ralph to argue it is applicable here: Ralph's petition for final distribution was filed in August 2008, well before the trust terminated. Although the trial was delayed and did not actually conclude before the technical termination date, the corpus of the trust had not vested in the beneficiaries and was not under their direct control prior to the court's final order.

Regarding Ralph's contention a probate court may disregard a spendthrift clause once it has outlived its purpose and usefulness—for example, when there has been a long delay in distributing the income or principal (see Rest.3d Trusts, § 58, p. 355)—or deviate from the terms due to unforeseen circumstances (see Prob. Code, § 15409), these are arguments involving questions of fact that should have been made before the probate court. They are not properly raised for the first time on appeal. (See *Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1129; *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.)

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6 The termination clause provides, "Unless sooner terminated in accordance with other provisions, each trust created under this Declaration of Trust shall terminate twenty-one (21) years after the death of the Trustor. All principal and undistributed income of any trust so terminated shall be distributed to the then beneficiaries of that trust."

DISPOSITION

The order is affirmed. Constance and Farmer are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.